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No. 93-503

In the Supreme Court of the United States

OCTOBER TERM, 1993

WILLIAM M. LIPS, PETITIONER

v.

COMMANDANT, UNITED STATES DISCIPLINARY BARRACKS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioner was entitled to habeas corpus relief on the ground that the prosecutor at petitioner's court-martial questioned him about his post-arrest silence and commented on his post-arrest silence in closing argument.

2. Whether petitioner was entitled to habeas corpus relief on the ground that "other acts" evidence was admitted at petitioner's court-martial.

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OPINIONS BELOW

The opinion of the court of appeals, Pet. App. 1a-8a, is reported at 997 F.2d 808. The opinion of the district court on habeas corpus, Pet. App. 9a-18a, is unreported. The opinion of the Air Force Court of Military Review affirming petitioner's conviction, Pet. App. 21a-30a, is reported at 22 M.J. 680. The order of the Court of Military Appeals denying discretionary review, Pet. App. 20a, is noted at 24 M.J. 45.

JURISDICTION

The judgment of the court of appeals was entered on July 1, 1993. The petition for a writ of certiorari was

filed on September 28, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

In 1984, at Hahn Air Force Base in Germany, petitioner was convicted by a military court-martial of rape, in violation of Article 120, Uniform Code of Military Justice (UCMJ), 10 U.S.C. 920; forcible sodomy, in violation of Article 125, UCMJ, 10 U.S.C. 925; and three counts of aggravated assault, in violation of Article 128, UCMJ, 10 U.S.C. 928. He was sentenced to a dishonorable discharge, 20 years' confinement, total forfeiture of pay and allowances, and a reduction in rank. The Air Force Court of Military Review affirmed petitioner's conviction and sentence, Pet. App. 21a-30a, and the Court of Military Appeals denied discretionary review, *id.* at 20a.

Petitioner subsequently filed a petition for a writ of habeas corpus in the United States District Court for the District of Kansas. The district court granted the petition, Pet. App. 9a-18a, but the court of appeals reversed and directed the district court to deny the petition, *id.* at 1a-8a.

1. On June 3, 1984, petitioner, a member of the United States Air Force, invited Cynthia Carite to his quarters for dinner while his wife was away. After showing Carite a sexually explicit magazine entitled *Penthouse Variations*, petitioner forced Carite to undress, tied her to a coffee table, and sodomized and raped her, threatening her first with a knife and then with a gun. Petitioner then placed "nipple clamps" on Carite's breasts and beat her with a belt, after which he forced her to engage in further sexual acts. After dinner, petitioner again raped

Carite, engaged in oral sex, and unsuccessfully attempted to have anal intercourse with her. Pet. App. 22a-23a.

The following day, Carite reported the crime to the authorities. Military law enforcement agents arrested petitioner and informed him of his right against compelled self-incrimination. Petitioner declined to make a statement. In a search of petitioner's residence, the agents seized a videotape and five magazines containing depictions of explicit sexual behavior. The dominant theme of those materials was the physical and sexual abuse of women. Pet. 5; Pet. App. 3a, 23a.

2. At petitioner's court-martial, the military judge admitted the sexually explicit videotape and some of the magazines into evidence over petitioner's objection that their admission violated the ban on "other crimes" evidence under Mil. R. Evid. 404(b). Pet. App. 24a-25a.

In its case-in-chief, the government did not present evidence of petitioner's pretrial silence. During the defense case, however, petitioner's attorney asked him whether he had previously told his side of the story to a government official. Petitioner replied that he had not, and he then explained that he had wanted to talk about the incident but was advised by his attorneys to remain silent. Petitioner then testified that Carite had initiated the steps that led to their engaging in a variety of sexual acts. Petitioner claimed that Carite falsely accused him of rape after she asked him for $200 in exchange for the sexual acts she had performed, but he gave her only $60. Pet. 6; Pet. App. 3a, 23a-24a.

On cross-examination, the prosecutor attempted to show that the real reason petitioner made no post-arrest statement was that he wanted to hear the government's evidence and Carite's testimony before giving anyone his version of events so that he could tailor his testimony to make it more believable. Petitioner's counsel did not object to that line of cross-examination on Fifth Amendment grounds. Counsel's only objection during the prosecutor's questions on that subject was an unspecific objection to a compound question asked by the prosecutor. Pet. 7-8.

During closing argument, the prosecutor stated that while petitioner's pretrial silence was not evidence of his guilt, petitioner had waited until trial to tell his story so that he could first hear Carite's testimony. Petitioner did not object to that argument. *Id.* at 8-9.

3. On appeal to the Air Force Court of Military Review, petitioner raised 12 issues. As one of those issues, he challenged the admission of the sexually explicit videotape and magazines, arguing that they were not admissible as "other crimes" evidence under Mil. R. Evid. 404(b), and that their prejudicial impact substantially outweighed their probative value under Mil. R. Evid. 403. As another issue on appeal, petitioner contended that the prosecutor improperly commented on his pretrial silence in violation of this Court's holding in *Doyle* v. *Ohio*, 426 U.S. 610 (1976).[1] Petitioner framed the issue as follows:

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[1] In *Doyle*, this Court held that due process bars the government from impeaching a defendant with his post-arrest silence if he was advised at that time of his right to remain silent.

> Reversible error occurred during * * * argument by trial counsel as to the following: (A) improper comment on [petitioner's] exercise of his right to remain silent prior to trial; (B) improper and inflammatory argument by trial counsel; and (C) improper statements of law during argument, to include, but no[t] limited to, shifting the burden of proof onto [petitioner].

Pet. C.A. App. 63. In the argument portion of his brief, petitioner contended that the prosecutor improperly referred to his pretrial silence in closing argument; as part of his argument in support of that contention, petitioner referred briefly to the prosecutor's cross-examination in which the prosecutor questioned petitioner about his post-arrest silence. *Id.* at 64-69. In response, the government contended that the sexually explicit material had been properly admitted into evidence and that petitioner had waived the *Doyle* issue by not objecting at trial. See Gov't C.A. Br. 8-10.

4. The Air Force Court of Military Review affirmed petitioner's conviction. Pet. App. 21a-30a. The court held that the military judge did not abuse his discretion by admitting the sexually explicit videotape and magazines. *Id.* at 27a. The court stated that the material was relevant to show petitioner's motive, intent, and preparation, and to corroborate the victim's testimony. *Ibid.* In particular, the court determined that the evidence was relevant because some of the sadomasochistic acts depicted in the materials were similar to petitioner's sexual acts with Carite. *Id.* at 26a.

The Court also rejected petitioner's *Doyle* claims, noting as follows (Pet. App. 28a):

> [Petitioner] also contends he is entitled to a new trial because of * * * sentencing arguments by government counsel. [Petitioner's] counsel entered no objection at trial to the now challenged statements made during argument. In view of this, we consider this issue to be waived on appeal in the absence of plain error, which doctrine we find no basis here to invoke.

The Court of Military Appeals denied petitioner's request for review without opinion. Pet. App. 20a.

5. In 1988, petitioner filed a petition for a writ of habeas corpus under 28 U.S.C. 2241, alleging that the military judge had improperly admitted the sexually explicit videotape and magazines and that the prosecutor had improperly commented on his post-arrest silence. Pet. 2; Pet. App. 9a-10a. On July 31, 1992, the district court granted the writ. Pet. App. 18a. With respect to the sexually explicit materials, the court found that petitioner had "failed to show that the admission of those materials resulted in a fundamentally unfair trial." *Id.* at 11a. The court held, however, that the prosecutor violated petitioner's Fifth Amendment rights by questioning petitioner on cross-examination about his post-arrest silence. *Id.* at 15a. The court found the general objection during the cross-examination sufficient to preserve the *Doyle* issue and concluded, alternatively, that the "lack of an objection may be disregarded" as "plain error." *Id.* at 17a.

6. The court of appeals affirmed in part, reversed in part, and directed the district court to deny the petition. The court of appeals found that the Air Force courts, in determining that the prosecutor's argument was not plain error, applied proper legal

standards and gave "full and fair consideration" to that issue. The court further held that petitioner did not adequately preserve the improper cross-examination issue in the military courts. The court noted that petitioner made no timely and specific objection to the prosecutor's cross-examination at trial, and that he made only a brief reference to the cross-examination issue in his brief on appeal. Because petitioner had forfeited that claim below, and because he failed to show "cause and actual prejudice" for his default, the court of appeals held that he was not entitled to habeas relief. Pet. App. 7a-8a.

Finally, the court of appeals affirmed the district's court decision denying petitioner habeas corpus relief on the sexually explicit materials claim. The court of appeals concluded that the military courts had fully and fairly considered petitioner's claim concerning the admission of those materials and that there was therefore no need for further inquiry on that issue. Pet. App. 8a.

ARGUMENT

Petitioner contends that the court of appeals applied an unduly restrictive standard for habeas corpus review of military convictions, and that the court therefore erroneously refused to grant him relief from those convictions.[2]

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[2] Petitioner argues in a footnote (Pet. 18 n.9) that this case should be held pending the Court's decision in *Weiss* v. *United States*, cert. granted, 113 S. Ct. 2412 (1993) (No. 92-1482), which presents the questions whether the designation and selection of military judges satisfies the Appointments Clause and whether due process requires a fixed term of office for military judges. Because petitioner did not raise those issues in the military courts, the district court, or the court of appeals,

1. In *Burns* v. *Wilson*, 346 U.S. 137 (1953), this Court set forth the standard for habeas corpus review of military convictions. The Court held that because the military criminal justice system "exists separate and apart from the law which governs in our federal judicial establishment," *id.* at 140, and because Congress has provided that the determinations of military courts are "final" and "binding" upon all courts, *id.* at 142, citing Art. 76, UCMJ, 10 U.S.C. 876, it is "not the duty of the civil courts * * * to reexamine and reweigh each item of evidence of the occurrence of events which tend to prove or disprove one of the allegations in the applications for habeas corpus." *Id.* at 144. Rather, it is "the limited function of the civil courts to determine whether the military have given fair consideration to each of these claims." *Ibid.* That is, "when a military decision has dealt fully and fairly with an allegation raised in [a habeas corpus] application, it is not open to a federal civil court to grant the writ simply to re-evaluate the evidence." *Id.* at 142.[3]

The *Burns* test, referred to as the "full and fair consideration" standard, has consistently been applied by federal courts in disposing of military habeas corpus petitions. Although courts have at

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they are waived here. See *Solorio* v. *United States*, 483 U.S. 435, 451 n.18 (1987).

[3] The quoted language is from the plurality opinion of Justice Vinson for four Members of the Court. Justice Minton concurred in the result, 346 U.S. at 146-148, but because he favored a more restrictive standard of review, it is clear that a majority of the Court regarded the standard in the plurality opinion as setting the limit on the extent to which a habeas court could review military convictions.

times encountered difficulties in determining how that standard should be applied in particular cases, see *Allen* v. *VanCantfort*, 436 F.2d 625, 629-630 (1st Cir.) (noting difference among courts in construing *Burns* test), cert. denied, 402 U.S. 1008 (1971), there has been no significant divergence of views as to whether that standard is the appropriate test for habeas review of military convictions.[4] In particular, the court of appeals in this case adopted the standard that has emerged as the leading articulation of the *Burns* test. See Pet. App. 5a-6a. Under that standard, a habeas court can review not only whether the military courts have given adequate consideration to a particular claim, but also whether the military courts have applied the proper legal principles in addressing that claim. See *Khan* v. *Hart*, 943 F.2d 1261, 1262-1263 (10th Cir. 1991); *Dodson* v. *Zelez*, 917 F.2d 1250 (10th Cir. 1990); *Monk* v. *Zelez*, 901 F.2d 885, 888 (10th Cir. 1990); *Calley* v. *Callaway*, 519 F.2d 184, 199-203 (5th Cir. 1975) (en banc), cert. denied, 425 U.S. 911 (1976); *Daigle* v. *Warner*, 348 F. Supp. 1074, 1078 (D. Haw. 1972), rev'd on other grounds, 490 F.2d 358 (9th Cir. 1973).[5]

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[4] In some of the cases that petitioner cites (Pet. 21 n.17), the courts have not addressed the question of the proper standard to apply. Those cases therefore do not bear on the question of the appropriate standard for habeas corpus review. Other cases have involved challenges to court-martial proceedings by means other than habeas corpus; those decisions are thus of limited relevance to the question of the proper scope of habeas corpus in challenges to military convictions. See *Shaw* v. *United States*, 357 F.2d 949, 953 & n.4 (Ct. Cl. 1966), and cases cited therein (claims for back pay for wrongful dismissal).

[5] All but one of the cases cited by petitioner in support of his claim that the courts of appeals disagree about the proper

Because the court of appeals' articulation of the "full and fair consideration" standard requires that the military courts both consider the issue in question and apply the correct legal standard in doing so, petitioner is wrong in characterizing the standard applied by the court of appeals as being "that once an issue is briefed and argued before a military court, it is considered to be fully and fairly considered by the military courts." Pet. 22. For the same reason, he is incorrect in asserting that the Tenth Circuit's standard of review is "so restrictive that it virtually eliminates federal court review of military court decisions in the Tenth Circuit and renders the right of service members to habeas corpus relief in the Tenth Circuit nonexistent." Pet. 24. As this case illustrates, the Tenth Circuit standard provides for collateral review of military proceedings when the habeas petitioner raises substantial constitutional claims based on legal, rather than factual, grounds. See, *e.g.*, *Khan* v. *Hart*, 943 F.2d 1261, 1263-1265 (10th Cir. 1991) (reviewing legal issues raised by non-delegation doctrine); *Dodson* v. *Zelez*, 917 F.2d 1250, 1252 (10th Cir. 1990) (reviewing court-martial voting

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application of the "full and fair consideration" test (see Pet. 21-22) pre-date the Fifth Circuit's 1975 en banc decision in *Calley* v. *Callaway*, *supra*, in which that court discussed the issue at length and adopted the standard that has since been applied regularly in military habeas corpus cases. The one post-1975 case that petitioner cites is *Hatheway* v. *Secretary of the Army*, 641 F.2d 1376 (9th Cir.), cert. denied, 454 U.S. 864 (1981), a declaratory judgment action in which the court of appeals addressed and denied a purely legal challenge to the constitutionality of the provision of the Uniform Code of Military Justice on which his court-martial conviction was based.

procedures); *Mendrano* v. *Smith*, 797 F.2d 1538, 1542 n.6 (10th Cir. 1986).[6]

2. Even if there is some divergence among the courts of appeals as to how the *Burns* test should be applied in particular cases, the resolution of the two issues presented in this case would be the same regardless of the precise articulation of the test for habeas review of military judgments. The court refused to reach the merits of petitioner's Fifth Amendment claims because petitioner failed to show "cause and actual prejudice" to excuse his failure to preserve those claims in the military court system. And the district court denied petitioner's evidentiary claim after applying an even more lenient standard of review, a standard that even petitioner does not claim was unduly restrictive.

a. Petitioner defaulted on his Fifth Amendment claims in the military courts, and he has shown no reason why he should be relieved of that default for purposes of habeas corpus. It is well settled that, even in civilian habeas corpus proceedings, a defendant may not raise on collateral attack an issue that he did not preserve for appeal by making a contemporaneous objection at trial unless he can show cause for his default and actual prejudice resulting from the

[6] Petitioner argues that the Fifth Circuit, in *Calley* v. *Callaway*, *supra*, suggested a standard of review that reaches the merits of constitutional claims even when those claims were given plenary consideration by the military appellate courts. Petitioner fails to point out, however, that in *Dodson* v. *Zelez*, 917 F.2d 1250 (10th Cir. 1990), the Tenth Circuit explicitly adopted the standard set out in *Calley*, and that the court of appeals applied that standard in this case. See Pet. App. 5a-6a, 11a-12a.

error in question. See *United States* v. *Frady*, 456 U.S. 152, 167-168 (1982); *Davis* v. *United States*, 411 U.S. 233 (1973); *Wainwright* v. *Sykes*, 433 U.S. 72 (1977) (pretrial right to silence claim). See also *Wolff* v. *United States*, 737 F.2d 877 (10th Cir.) (applying cause and actual prejudice standard in review of military habeas petition), cert. denied, 469 U.S. 1076 (1984).

By failing to object on Fifth Amendment grounds to the prosecutor's cross-examination or closing argument, petitioner forfeited his claim that the prosecutor violated *Doyle* by improperly commenting on his post-arrest silence. His single, unspecific objection during the middle of the prosecutor's cross-examination was inadequate to preserve the *Doyle* issue for review. See Mil. R. Evid. 103(a)(1). Furthermore, as noted by the court of appeals, Pet. App. 7a, petitioner's failure to present the question of the prosecutor's cross-examination as an issue on appeal to the Air Force Court of Military Review constituted a second default; the court properly found that the abbreviated reference to the cross-examination in his brief on appeal to that court was inadequate to preserve the issue, and it explained why the court of military review did not address that issue separately from the *Doyle* claim based on the prosecutor's closing argument.[7] Since petitioner has never established

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[7] Petitioner relies (Pet. 26-27) on *United States* v. *Arnold*, 425 F.2d 204 (10th Cir. 1970), to argue that the court of appeals should have considered his *Doyle* claim in spite of the absence of a proper objection at trial. *Arnold*, however, applied the plain error doctrine on direct appeal from a conviction. *Id.* at 206. But the plain error doctrine is inapplicable on collateral attack. Even in the civilian system, a habeas petitioner must meet the

either "cause" or "actual prejudice" for his default, he was not entitled to raise the *Doyle* issue on collateral attack of his court-martial conviction.[8] See Pet. App. 8a.

Second, petitioner, not the government, initiated the inquiry into his post-arrest silence during direct examination and renewed that inquiry on redirect examination. Petitioner's counsel apparently thought that it was important for petitioner's defense of consent to bring out the fact that petitioner had not made a statement at the time of his arrest and to

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more stringent "cause and actual prejudice" test. See *Frady*, 456 U.S. at 164. Petitioner also suggests (Pet. 27-28) that *Doyle* itself does not require an objection at trial to preserve the issue on appeal or collateral attack. *Doyle*, however, was a direct appeal, and the defendants objected to the prosecutors' comments on their post-arrest silence. 426 U.S. at 614-616. Nothing in *Doyle* or any other decision of this Court suggests that a *Doyle* error can be raised for the first time on appeal or on collateral attack.

[8] Petitioner's attempt to extend the holding of *Doyle*, which barred the prosecutor from initiating an inquiry into the defendant's post-arrest silence, to a case in which the defendant initiates the inquiry into his post-arrest silence as a matter of trial tactics, violates the ban on using habeas corpus to create a "new rule" of law. A habeas petitioner seeks a "new rule" if his claim was not dictated by existing precedent at the time of his conviction or if his interpretation of the law was susceptible to debate among reasonable minds at the time his conviction became final. See *Saffle* v. *Parks*, 494 U.S. 484, 488 (1990); *Butler* v. *McKellar*, 494 U.S. 407, 413-415 (1990). Petitioner's extension of *Doyle* to cases in which the defendant first raises the issue of his post-arrest silence is certainly not dictated by *Doyle* itself; at the very least, it is debatable whether that extension of *Doyle* is compelled by the principles the Court developed in *Doyle*.

elicit petitioner's explanation of why he had not done so. But having raised the issue of his post-arrest silence and having given his explanation for it, petitioner could not then deny the prosecutor an opportunity to probe the issue on cross-examination and address it during closing argument. See *United States* v. *Pino*, 827 F.2d 1429, 1432 (10th Cir. 1987); *Lebowitz* v. *Wainwright*, 670 F.2d 974, 980-981 (11th Cir. 1982). See also *United States* v. *Robinson*, 485 U.S. 25, 32 (1988) (no Fifth Amendment violation where prosecutor merely responded to defendant's comment on his right to remain silent).

b. Petitioner also contends that the court of appeals erred by not reviewing on the merits his claim that the military judge improperly admitted evidence that he possessed sadomasochistic materials. Even on habeas corpus review of federal and state convictions, courts do not review the admission of other crimes evidence at a criminal trial *de novo*. Instead, such review is limited to whether the admission of that evidence resulted in a fundamentally unfair trial in violation of due process. See *Estelle* v. *McGuire*, 112 S. Ct. 475, 480-482 (1991). Here, the district court specifically held that the admission of the sexually explicit materials at petitioner's court-martial did not result in a fundamentally unfair trial. Pet. App. 11a; see also *id.* at 24a-27a (concluding that the probative value of the sexually explicit materials was not outweighed by its prejudicial value).

Although petitioner contends that the sexually explicit materials were not relevant to any material issue at trial, they were actually highly relevant. The *Penthouse Variations* magazine was relevant because, according to Carite, petitioner showed her

that magazine immediately before forcing himself on her. The introduction of the magazine thus corroborated the details of her story and supported her account that petitioner took the initiative in raising the subject of sex. The remaining magazines and the videotape, which were predominately sadomasochistic in theme, were particularly relevant, since petitioner's sadomasochistic rape and sodomy of Carite mirrored some of the acts portrayed in the magazines and the videotape. Proof that petitioner possessed those materials tended to show that petitioner raped and sodomized Carite to fulfill his aberrant sexual desires, and to rebut petitioner's contention that Carite had initiated sadomasochistic sex between them.[9] Petitioner is therefore not entitled to relief on either of the grounds on which he challenges his court-martial conviction.

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[9] Petitioner contends (Pet. 29-30) that the decision of the courts below upholding the admission of the sexually explicit materials conflicts with *Lovely* v. *United States*, 169 F.2d 386 (4th Cir. 1948). *Lovely* was a rape case in which the defendant alleged consent. Over the defendant's objection, the prosecution presented evidence that the defendant had raped another woman. The Fourth Circuit reversed the conviction, holding that evidence of the other rape should not have been admitted because it was not relevant to any material issue in the case. In this case, by contrast, the materials that focused on sexual abuse of women tended to support Carite's story of the rape and other sexual assaults. What is more, because this case was on habeas corpus the district court limited its inquiry to whether the admission of the evidence rendered the trial fundamentally unfair, not, as in *Lovely*, whether the evidence was admissible under the rules of evidence.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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